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HOLLINGSWORTH V. PERRY: WHAT SHOULD THE COURT DO?

ERWIN CHEMERINSKY[†]

Justice Anthony Kennedy faces a simple choice with profound consequences: When the Supreme Court considers the issue of marriage equality for gays and lesbians, does he want to write the next *Plessy v. Ferguson*¹ or the next *Brown v. Board of Education*?²

As Justice Kennedy approaches the issue, he likely knows it is just a matter of time before gays and lesbians are accorded marriage equality in this country. Since the year 2000, eleven countries have begun allowing same-sex couples to marry: The Netherlands, Belgium, Spain, Canada, South Africa, Norway, Sweden, Portugal, Iceland, Argentina, and Denmark.³ Last year, three more state legislatures, in Maine, Maryland, and Washington, adopted legislation allowing gays and lesbians to marry.⁴ Recent opinion polls show that half of Americans now favor allowing gay marriage;⁵ a 2011 poll found that 70% of Americans between the ages 18 and 34 support gay marriage.⁶

In light of this, Justice Kennedy has to know that a Supreme Court opinion rejecting marriage equality will be considered in hindsight to be as misguided as the infamous *Bowers v. Hardwick* ruling, which held that states could criminalize private, adult, consensual homosexual activity.⁷ Justice Kennedy wrote the opinion in *Lawrence v. Texas*,⁸ overruling *Bowers*. In fact, *Lawrence v. Texas* was one of only two Supreme Court decisions in history advancing rights for gays and lesbians—the other was *Romer v. Evans* in 1996—and Justice

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1. 163 U.S. 537 (1896) (upholding separate but equal as constitutional).

2. 347 U.S. 483 (1954) (holding that separate can never be equal in public education).

3. *The Freedom to Marry Internationally*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/landscape/entry/c/international> (last updated Dec. 2012).

4. *States*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states> (last updated Nov. 8, 2012).

5. *Behind Gay Marriage Momentum, Regional Gaps Persist*, PEW RES. CENTER FOR THE PEOPLE & THE PRESS (Nov. 9, 2012), <http://www.people-press.org/2012/11/09/behind-gay-marriage-momentum-regional-gaps-persist/>; Frank Newport, *Half of Americans Support Legal Gay Marriage*, GALLUP (May 8, 2012), <http://www.gallup.com/poll/154529/Half-Americans-Support-Legal-Gay-Marriage.aspx>.

6. Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, GALLUP (May 20, 2011), <http://www.gallup.com/poll/147662/first-time-majority-americans-favor-legal-gay-marriage.aspx>.

7. 478 U.S. 186 (1986) (upholding Georgia law prohibiting anal-genital or oral-genital contacts).

8. 539 U.S. 558 (2003) (reversing *Bowers* and finding a constitutional right to engage in private consensual same-sex sexual activity).

Kennedy authored the majority opinions in both.⁹

The Supreme Court has granted review in two cases concerning marriage equality to be decided in 2013. In *United States v. Windsor*, the Court will decide the constitutionality of Section 3 of the Defense of Marriage Act, which states that marriage must be between a man and a woman for the purposes of federal law.¹⁰ In *Hollingsworth v. Perry*, the Court will decide the constitutionality of California's Proposition 8, which amended the California Constitution to provide that marriage has to be between a man and a woman.¹¹ Proposition 8 overturned a California Supreme Court decision interpreting the California Constitution to include a right to marriage equality for gays and lesbians.¹² In each case, there are jurisdictional questions: whether House Republicans can defend the Defense of Marriage Act in light of the Obama administration's refusal to do so, and whether supporters of an initiative may defend it on appeal when the Governor and Attorney General refuse to do so.

In *Perry*, the Supreme Court has the opportunity to decide the constitutionality of same-sex marriage.¹³ In doing so, Justice Kennedy and the Court can choose between two possible approaches in invalidating Proposition 8.¹⁴

I.

RULE NARROWLY AND INVALIDATE ONLY CALIFORNIA'S PROPOSITION 8

One approach for Justice Kennedy would be to rule narrowly in *Hollingsworth v. Perry*, as the Ninth Circuit did in *Perry v. Brown*, and simply strike down California's Proposition 8.¹⁵ This approach has the virtue of

9. *Id.*; *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating a Colorado initiative repealing all laws in the state protecting gays and lesbians from discrimination and prohibiting the enactment of any new such statutes).

10. *United States v. Windsor*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 81 U.S.L.W. 3116 (U.S. Dec. 7, 2012) (No. 12-307) (citing Defense of Marriage Act, 1 U.S.C. § 7 (1996)).

11. 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144), *granting cert. to Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *aff'g Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010); *Perry v. Brown*, 671 F.3d at 1067 (citing CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE 54 (2008), *available at* <http://vig.cdn.sos.ca.gov/2008/general/title-sum/pdf/prop8-title-summary.pdf>).

12. *Perry v. Brown*, 671 F.3d at 1063.

13. I focus primarily on *Perry* in this Comment, rather than *Windsor*, because I am contributing to a larger dialogue that began in the Symposium sponsored by the *N.Y.U. Review of Law & Social Change*, "Making Constitutional Change: The Past, Present, and Future Role of *Perry v. Brown*." This Comment expands upon the points I made regarding *Perry* as a Symposium panelist.

14. There is a third approach available that would have the effect of invalidating Proposition 8: the Court could say that supporters of Proposition 8 lack standing to appeal Judge Walker's ruling striking down the initiative. This would leave Judge Walker's state-wide injunction in place. I do not focus on this alternative in this essay, choosing instead to examine how the Supreme Court should write an opinion striking down Proposition 8 on the merits.

15. *Perry v. Brown*, 671 F.3d at 1080–82 (9th Cir. 2012).

invalidating only the California initiative without affecting other states that have always prohibited same-sex marriage. It may appeal to Justice Kennedy as a way of proceeding one step at a time.

This approach is also founded on sound constitutional grounds. Prior to the enactment of Proposition 8 in November 2008, California allowed both opposite-sex and same-sex couples to marry.¹⁶ Proposition 8 took this right away from gays and lesbians only.¹⁷ In its 2-1 decision in *Perry v. Brown*, the Ninth Circuit concluded that there is simply no legitimate reason for depriving only gays and lesbians of the right to marry.¹⁸ The court relied heavily on the Supreme Court's decision in *Romer v. Evans*, which declared unconstitutional a Colorado initiative that repealed laws protecting gays and lesbians from discrimination.¹⁹

Yet there is something unsatisfying about the Supreme Court taking this approach. Just as there is no legitimate reason for California to take away the right to marry only from gays and lesbians, there is no legitimate reason for other states to deny them this right. In *Lawrence v. Texas* and *Romer v. Evans*, Justice Kennedy, writing for the Court, found laws burdening gays and lesbians unconstitutional because they lacked any legitimate government purpose.²⁰ The same is true for all laws prohibiting marriage equality for gays and lesbians. Also, the Ninth Circuit's approach brings to light a difficult underlying issue: if a state recognizes a right that is not required by the Constitution, when may it repeal that right?

II.

RULE BROADLY AND INVALIDATE ALL BANS ON MARRIAGE EQUALITY AS VIOLATIONS OF EQUAL PROTECTION

This leads to the second approach, the one I believe Kennedy and the Court should take: follow the lead of Judge Vaughn Walker in the Northern District of California and declare that laws denying marriage equality to gays and lesbians violate equal protection.²¹ Justice Kennedy can write an opinion in *Perry* that is very similar to those he authored in *Romer* and *Lawrence*, stating that there is no legitimate government interest in denying marriage equality to gays and lesbians.

Justice Kennedy can go through each justification offered for denying

16. *Id.* at 1076.

17. *Id.*

18. *Id.* at 1095 ("Proposition 8 operates with no apparent purpose but to impose on gays and lesbians, through the public law, a majority's private disapproval of them and their relationships . . . Proposition 8 therefore violates the Equal Protection Clause.").

19. *Id.* at 1080–82 (citing *Romer v. Evans*, 517 U.S. 620, 627 (1996)) (comparing Proposition 8 to the amendment at issue in *Romer*).

20. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Romer*, 517 U.S. at 621.

21. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010), *aff'd sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *granting cert. sub nom. to Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

marriage equality and find that none is a legitimate government interest. For instance, one argument against same-sex marriage is that marriage is inherently between opposite-sex spouses. But that is a definition, not an argument. The fact that marriage has traditionally been between opposite-sex spouses doesn't reveal anything about the characteristics of marriage and why those characteristics have to be limited to opposite-sex couples. Under this form of argument, laws that prohibited interracial marriage were also constitutional. The Virginia law that prohibited interracial marriage existed for almost three hundred years.²² If a long tradition of prohibiting particular types of marriage is sufficient, then the Court came to the wrong conclusion in *Loving v. Virginia*.²³

Certainly, the existence of a practice over a long period of time doesn't tell us anything about whether that practice is legitimate or permissible. Admittedly, *Loving* used strict scrutiny, and it is uncertain whether the Supreme Court would do so in examining the ban on marriage equality for gays and lesbians, under either the Due Process or Equal Protection clauses.²⁴ But if one thinks about all of the core characteristics of marriage—the expression of love and commitment, the benefits and responsibilities—none of these has anything to do with the sexual orientation of the individuals participating.

A second argument that is likely to be advanced in the Court is that marriage is inherently about procreation.²⁵ Same-sex marriage doesn't make sense, it is argued, because same-sex couples can't procreate without assistance.²⁶ This argument is wrong on every possible level. Marriage, of course, is not inherently about procreation. Couples are allowed to get marriage licenses even if one or both of the spouses can't or don't want to procreate. Women past the age of menopause can get marriage licenses, as can men who have been sterilized or are infertile. A requirement of intent to procreate does not exist for heterosexual couples that want a marriage license, so there's no sense imposing one on same-sex couples. More importantly, same-sex couples do procreate, whether through artificial insemination, surrogacy, or adoption. Even if marriage were about procreation, there would be no legitimate reason to deny it to same-sex couples because they have children, too.

A third argument is that children do better with opposite-sex parents than with same-sex parents, and thus the government is justified in denying marriage licenses for same-sex couples. President George W. Bush made this argument. He said the social science data shows that children do better if they have parents

22. RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* 19 (2001).

23. 388 U.S. 1 (1967) (finding bans on interracial marriage unconstitutional).

24. *Id.* at 11.

25. This was the primary argument of the supporters of Proposition 8 in the Ninth Circuit. See *Perry v. Brown*, 671 F.3d at 1086–87 (9th Cir. 2012).

26. *Id.*

of opposite genders.²⁷

At the outset, it is important to note that studies do not actually support that proposition. The studies that George Bush pointed to show that children with single parents often have more problems than children with two parents.²⁸ But that has nothing to do with sexual orientation. It does reflect that being a parent is enormously difficult. (As somebody who has always been fortunate enough to have a partner in parenting, I can only imagine how difficult it is to be a single parent of a child.) It doesn't at all relate to the issue of whether or not same-sex couples should get marriage licenses.

Most of all, the problem with this argument is that it truly misses the point. The question is not whether same-sex couples should have children or not. The reality is that same-sex couples are going to have children. The question becomes whether children of same-sex couples are better off if their parents are married. I know of no studies that compare children with same-sex parents who are married to children with same-sex parents who are unmarried. Same-sex marriage is so new, not only in the United States but around the world, that time is needed to do such studies. Yet everything that we understand about marriage and how it contributes to the stability of relationships indicates that children with same-sex parents are better off if their parents are married, because marriage is more likely to lead to stable relationships.

In explaining this, Justice Kennedy can echo the words of Chief Judge Judith Kaye of the New York Court of Appeals, who declared:

The State plainly has a legitimate interest in the welfare of children, but excluding same-sex couples from marriage in no way furthers this interest. In fact, it undermines it. Civil marriage provides tangible legal protections and economic benefits to married couples and their children, and tens of thousands of children are currently being raised by same-sex couples in New York. . . . The State's interest in a stable society is rationally advanced when families are established and remain intact irrespective of the gender of the spouses.²⁹

A fourth argument that is often made against same-sex marriage is that it will harm the institution of marriage. I confess that I don't understand this argument. No heterosexual couple's marriage is adversely affected in the slightest by virtue of gays and lesbians also being able to marry. In fact, I cannot think of anything more affirming of the institution of marriage in my lifetime than the fight by gays and lesbians to be able to marry.

Thus, I believe that Justice Kennedy and the Court should choose the second

27. Benedict Carey, *Experts Dispute Bush on Gay-Adoption Issue*, N.Y. TIMES, Jan. 29, 2005, at A16.

28. *Id.*

29. *Hernandez v. Robles*, 855 N.E.2d 1, 32 (N.Y. 2006) (Kaye, C.J., dissenting).

path: decide that laws prohibiting marriage equality for gays and lesbians violate equal protection because they lack a legitimate government purpose.

For many years, Justice Kennedy taught constitutional law at McGeorge Law School in Sacramento.³⁰ As he imagines professors teaching the law in this area, it is hard to think that he would want to be remembered as the author of a *Plessy v. Ferguson*³¹ or a *Bowers v. Hardwick*.³² My hope is that Justice Kennedy will realize that the *Perry* decision, together with his opinions in *Romer v. Evans* and *Lawrence v. Texas*, can define his legacy as the justice in American history who did the most to advance equality based on sexual orientation. The alternative—an opinion reversing the Ninth Circuit—is on the wrong side of history, and it would ultimately be regarded as seriously misguided.

30. Anthony Kennedy, MCGEORGE SCH. OF L., http://www.mcgeorge.edu/Anthony_Kennedy.htm (last visited Jan. 16, 2013).

31. 163 U.S. 537 (1896).

32. 478 U.S. 186 (1986).